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As a matter of domestic law, the effect of a claim varies according to which of the two procedural techniques is employed. Direct interposition by the foreign state will be received merely as evidence to be judicially examined; recognition of a claim of immunity by the executive branch will in general either be considered conclusive or as an opinion that should be accorded great weight. The United States Supreme Court's views of the effect to be given to executive suggestions were expressed in *Mexico v. Hoffman* (324 U.S. 30 (1945)); *Ex Parte Peru* (318 U.S. 578 (1943)); and *The Navemar* (303 U.S. 68 (1938)). The Department of State recently stated its views fully in an *amicus curiae* brief submitted in *Petrol Shipping Corp. v. Greece* (326 F. 2d 117 (1964) and modified by that court on 25 May 1964). The court held that the plea of immunity was properly presented in a suggestion by the ambassador of the defendant state, and that it was not necessary for the foreign state to establish immunity through State Department channels. (For a comment on this case, see 52 *Georgetown L.J.*, 857 (1964).) The effect of executive statements regarding the immunity of foreign states in the courts of the United Kingdom, the United States, Latin America, and Continental Europe has been analysed by Lyons in 22 *BYIL*, 240 (1946); 23 *BYIL*, 116 (1947); 24 *BYIL*, 180 (1948).

SECTION SIX

*THE ACT OF STATE DOCTRINE***7.31 The origin and present status of the doctrine**

International law does not require states to enforce within their own territories the official acts, executive, legislative, or judicial, of a foreign state. With some exceptions, the courts of most countries do accord, on the basis of comity, reciprocal recognition to private rights acquired by foreign law. In the absence of treaty obligations, recognition is usually not given to the public law of foreign states, in particular to penal and revenue laws.

States have developed various methods by which they assure them-

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selves that the enforcement of foreign law will not offend against the domestic law or policy. One method used principally in civil law jurisdictions is to have recourse to conflict of law, or private international law rules. In most of these cases foreign law is considered to be controlling, as long as deference to that law and enforcement of private rights in accordance with it does not offend the notions of public policy or *ordre public* held by the forum. Another method, largely a product of Anglo-American jurisprudence, consists of invoking the 'act of state' doctrine or the 'sovereign act' doctrine as it is known in British terminology. In its most absolute form, this doctrine would give effect to any official act of a foreign state even if the act would not ordinarily be enforced under the laws of the forum. ~~Public~~ **International lawyers strongly support the 'act of state' doctrine.**

Historically the doctrine appears to be an outgrowth of early cases in which a foreign sovereign enjoyed personal immunity from suit. (See Zander, 'The Act of State Doctrine', 53 *AJIL*, 826 (1959).) This immunity *ratione personae* then evolved into an immunity *ratione materiae*, that is, immunity that inheres in the act itself. The leading common law decisions formulating the doctrine vary only slightly from the language used in the parent case of *Underhill v. Hernandez* (163 U.S. 250 (1897)): 'Every sovereign state is bound to respect the independence of every other sovereign, and the courts of one country will not sit in judgment on the acts of another government done within its own territory'. (Cf. *Luther v. Sagor*, [1921] 3 K.B. 532; *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718, and other English cases in 3 *BILC*, 188.)

The doctrine was recently defined as:

The rule that a court, asked to pronounce itself on the legality of an act performed by a foreign State, even if it is asked to do so in proceedings between private parties, lacks competence thereto, unless the foreign State has given its consent.

Van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ*, 1193 (1964)

In the ~~*Sabbatino case*~~ (376 U.S. 398 (1964)), the United States Supreme Court stated that the doctrine 'precludes the courts of this country from inquiring into the validity of the public acts of a recognized government committed within its own territory' (at p. 401). Although these statements seem to imply that the 'act of state' doctrine represents an extension of the sovereign immunity principle, two different sets of

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premises are involved. The rules of sovereign immunity are imposed by international law; the 'act of state' doctrine is an additional limitation imposed by judicial self-restraint on the exercise of jurisdiction by the forum.

The principal question with which we are concerned is whether or not the interpretation of the 'act of state' doctrine in common law jurisdictions inhibits the examination of even those acts of foreign states that allegedly violate international law. The application of the doctrine in the majority of recent cases involved the expropriation or nationalization of alien property rights, particularly those early in this century by the Soviet Union, and by Mexico, and more recently by Iran, Indonesia, and Cuba. Typical examples of these cases are the suits initiated by the Anglo-Iranian Oil Company when oil expropriated by Iran was taken from that country into or through other states. See *Anglo-Iranian Oil Co. v. Jaffrate* (ILR, 1953, p. 316) decided by the Aden Supreme Court; cf., the Italian position in *Anglo-Iranian Co. v. SUPOR*. (1953) (ILR, 1955, p. 19); and the Japanese holding in *Anglo-Iranian Co. v. Idemitsu Kosan Kabushiki Kaisha* (ILR, 1953, p. 305). See also Domke, 'Indonesian Nationalizational Measures Before Foreign Courts' (54 *AJIL*, 305 (1960)), and Baade's 'Reply' (ibid. 801 (1960)). In light of divergent national court decisions, it may be concluded that customary international law does not require a state to recognize the validity of the 'acts of state' of a foreign state.

Until recently, however, no United States court had been asked to rule directly on the question of whether the 'act of state' doctrine would preclude review of a foreign state's act if the claimant alleged that the act violated international law. It seems that American courts will not as a rule test the act of a foreign state either against that state's own law or against the concepts of public policy in the forum. The opportunity to determine the existence of 'an international law exception' to the act of state doctrine arose after the Cuban nationalization of American property in 1960. At that time a financial agent of the Cuban Government sued a New York commodity broker for the return of certain proceeds from the sale of sugar belonging to Cuba. The defendant contested Cuba's claim of title to the sugar, alleging *inter alia*, that the act of nationalization violated international law and therefore did not pass valid title. A Federal District Court granted summary judgment for the defendant, upholding the claim that the 'act of state' doctrine was inapplicable when the act in question violated international law

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(*Banco Nacional de Cuba v. Sabbatino*, 193 F. Suppl. 375 (1961), affirmed by the Circuit Court on similar but narrower grounds, 307 F. 2d 845 (1962).

The United States Supreme Court, with one dissent, reversed the lower courts and refused to create a general exception to the 'act of state' doctrine for acts involving alleged breaches of international law (346 U.S. 398 (1964)). The reversal was based in part on the Court's conclusion that there is at present no generally accepted international law on the subject of nationalisation and confiscation. But the Court did not interpret the doctrine as an unqualified restriction on the power of judicial review of foreign acts of states:

rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, ~~it is not the province of the Judicial Branch to~~ **not examine the validity of a taking of property within its own territory by a foreign sovereign, extant and recognized by this country at the time of suit, in the absence of treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law**

At p. 428

The significance and the far-reaching implications of the *Sabbatino* decision aroused much interest in legal circles in the United States and abroad (for the bibliography of relevant literature, ~~see~~ *The Aftermath of Sabbatino*, pp. 211 ff., especially pp. 218-20, 225-8).

Reaction to the Supreme Court's decision was particularly strong in Congress, where it was interpreted as sanctioning confiscation even if it was retaliatory, discriminatory, and without compensation. ~~To counter-~~ **act the import of the rule enunciated by the Supreme Court, the Foreign Assistance Act of 1964 (78 Stat. at L. 1013) was subsequently amended. The amendment incorporated in Section 301 (d) of the Act, directed that no American court shall decline, on the ground of the federal act of state doctrine, to determine on the merits a case in which a claim of right by any party is based on confiscation by a foreign state, in violation of international law occurring after 1 January 1959; but the directive was made inapplicable in cases with respect to which the President determines and so informs the court that United States foreign policy interests require application of the act of state doctrine.** (See Lowenfeld 'The Sabbatino Amendment — International Law Meets Civil Procedure', 59 *AJIL*, 899 (1965).) The Act incorporating

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this amendment became law while the case was pending in the District Court in New York on remand.

The parties before the Court argued that the Hickenlooper amendment (i) does not apply to pending cases generally; (ii) does not apply to this particular case; and (iii) it is unconstitutional. The Court answered the first two issues in the affirmative; and held the amendment constitutional. However, before acting on defendants' motion to dismiss, the Court decreed that it would withhold final judgment for sixty days to give to the President full opportunity:

to make the determination provided for by the Amendment and if, in his wisdom he sees fit, to have a suggestion filed on his behalf that in this case application of the act of state doctrine is required by the foreign policy interests of the United States.

243 F. Suppl. 957 at 981 (1965)

Before the expiration of the sixty days, the U.S. Attorney informed the Court that he was instructed:

to inform the Court that no determination has been made (by the Executive Branch) that the application of the act of state doctrine is required in this case by the foreign policy interests of the U.S. So that there will be no ambiguity, the Court is advised that no such determination is contemplated

International Legal Materials, vol. 4, p. 1018 (1965)

~~On November 1965~~ the Court in a Memorandum opinion dismissed the complaint, stating that it was bound by the prior determination of the Circuit Court of Appeals ~~since the findings of that Court that the Cuban confiscation decree on which the plaintiff's claim rested violated international law~~, was not affected by the Supreme Court's decision (*ibid.*, p. 1209).